79-6574

IN THE SUPREME COURT OF THE
UNITED STATES TERM 19

RECEIVED
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SUPREME COURT, U.S.

UNITED STATES OF AMERICA,
Respondent.

Vs.

FRANCIS D. FERRI, et al,
KENNETH R. MATTHEWS,
Petitioner.

CRIMINAL NO: 74-277 (W.Pa.)

APPELLATE NO: 78-2370

DISTRICT COURT NO: 78-599 (W.Pa.)

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

~~MOTION FOR VACATION OF SENTENCE~~

S/ Kenneth R. Matthews

KENNETH R. MATTHEWS
Pembroke Station
Danbury, Ct 06810

INDEX

A. Petitioner for writ of Certiorar

I. Opinion below

II. Jurisdiction

III. Questions presented

A. The United States Bureau of Prisons by knowingly amending the petitioners Parole elligibility to Title 18 U.S.C. 4205 (b)(2) violated Due Process and Division of Powers as defined in the Constitution.

B. The petitioner is elligible for Parole under Title 18 U.S.C. 4208 (A)(2) (1970), statutory parole elligibility criteria 28 C F R 2.18 and petitioner should be released on parole.

C. The guidelines, 1976 P.C.R.A are illegal, violate the intent of Congress and the "Ex Post Facto" Clause of the Constitution.

D. The Parole Board (Commission) is bound by its own Rules and Regulations in consideration for Parole, and the Laws and Constitution of the United States.

E. The District Court errored in its opinion of 10/17/80, missing the thrust of the issues at 78-599 in its reliance on West, Supp. 1977.

F. That the Parole Board (Commission) guidelines applied were incorrect.

G. That the Parole Board (Commission) denied him of assistance of counsel by their Actions.

IV. Statement of Fact

V. Reasons for Granting the Writ

VI. Conclusion

VII. Appendix

1. Judge Marsh opinion at 78-599 (8/31/78)
2. Judgement and Commitment order 4/23/75
3. Judge Marsh sentencing remarks
4. Sentence computation sheet 1/17/78
5. Affidavit
6. Guidelines and Affidavit
7. Kansas Defender letters 8/28/78
8. Letter / Dawson / 1/19/79
9. Parole Action part A, worksheet et al

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR VACATION OF SENTENCE

Now comes the Court to vacate the petitioners sentence imposed at Criminal Number 74-277 for the reasons as set-forth hereafter:

I. Opinion Below

A. On April 23,1975 the petitioner was sentenced by Judge Rabe Marsh United States District Judge for the Western District of Pennsylvania in a nine (9) count indictment at 74-277 with parole elligibility pursuant to Title 18 U.S.C Section 4208 (A)(2). The petitioner is unlearned at law and has perhaps failed to drive home the thrust of his civil action at 78-599 (W.Pa.) and on October 17,1978 this motion was denied and a ordered entered

II. Jurisdiction, a timely appeal of Judge Marshs order denying the motion at 78-599 was made to the United States Court of Appeals for the Third Circuit and a order was rendered March 7, 1980 on a petition for a Rehearing was made and a decision rendered denying same was entere

III. Questions Presented;

A. The United States Bureau of Prisons by knowingly Amending the petitioners Parole Elligibility to Title 18 U.S.C. 4205 (b)(2) violated Due Process and Division of powers as defined in the Constitution.

B. The petitioner is elligible for parole under Title 18 U.S.C 4208 (A)(2) (1970), statutory parole elligibility criteria 28 C.F.R..2.18 and the petitioner should be released on parole.

C. The Guidelines, 1976 P.C.R.A. are illegal, violate the intent of Congress and the "Ex Post Facto" Clause of the Constitution.

D. The parole board (Commission) is bound by its own Rules and Regulations in considerations for parole, and the laws and Constitution of the United States.

E. The District Court errored in its opinion of 10/17/78, missing the thrust of the issues at 78-599..in its reliance on West. Supp 1977.

F. That the parole board (Commission) Guidelines applied were incorrect.

G. That the Parole Board (commission) denied him of Assistance of counsel by their Actions.

IV. . Statement of Fact;

On April 23,1975 the petitioner was sentenced to Fifteen (15) years incarceration at 74-277 with parole elligibility pursuant to Title 18 U.S.C. 4208 (a)(2) (Exhibit 2) At sentencing, the court entered into the Record, the parole criteria 1970;

> ++"asfar as Mr. Matthews is concerned, this is a one-time event." (pp5, lines 3-5). "But the testimoney was entirely circumstantial, I don't know who paid that $5,000.00 to Ferri to this day and neither does the Government;" "I don't like convictions on circumstantial evident," (pp9-line 9) "This is a very painful task. I would hate to think that I am sentencing an innocent man".

In pronouncing sentence; "As I see it, medical officers will have to examine him ...,penologists should take this trial and its peculiarities into consideration,++++ I don't think deterence will do any good to anyone else, I don't see any indication that Rehabilitation is necessary." (pp12,lines 6-15) (Exhibit 3).

On December 1,1977 Matthews commenced serving the sentence imposed at 74-277, reaching his designated place of incarceration, the Leaven Worth Federal Penitentiary 12/22/77, being classified on January 17,1978 the Bureau of Prisons sentence computation record Amended parole elligibility to Title 18 U.S.C. 4205 (b)(2); Stating it was the same as Title 18 U.S.C. 4208 (A)(2) in "all respects, considerations and criteria". (Exhibit. 4)

On April 18,1978 the petitioner received his inital parole hearing pursuant to Parole Elligibility Under Title 18 U.S.C. 4205 (b)(2); With statutory Parole criteria found at 4203 (a)(1) (1976) and mandato at 4206 (1976). The petitioner filed this Action before the Honorable District Court (W.Pa.) at 78-599 folluing his inital parole hearing under the 1976 P.C.R.A. pursuant to the authority of Title 28 U.S.C 2241, treated by the District Court as a motion to vacate sentence pursuant to 28 U.S.C. 2255. On May 11,1978 the petitioner received his notice of Actiob for the parole hearing of April 18,1978, continuing him for a four (4) year reconsideration hearing in April, 1982.

V. Reasons for granting a Writ of Certiorai:

A. The United States Bureau of Prisons by knowingly Amending the petitioners parole elligibility to Title 18 U.S.C. 4205 (b)(2) violated Due Process and the division of powers as defined in the Constitution for the petitioner should have received his inital parole hearing within 90 days of reaching his designated place of incarceration or 30 days of classification, not latter than March 18,1978..... The petitioner should have been taken to the February Parole Board at which time he would have been immediately elligible for parole had proper consideration been given to his excellant pre-sentence report, the parole criteria of the 1976 Parole Act as brought forth so well by Judge Marsh at sentencing. The issue is that the Executive Branch of Government, through the Attorney General and his Assignees, assumed powers reserved to the Judiciary in Amending the Prisoners Sentence a totally Un-Constitutional Act, one of Commission, not one of ommission in violation of the Laws and Constitution of the Constitution, a illegal second sentencin

The change or modification of sentence terms governing the administrati and enforcement of the sentence, or parole elligibility and its criteria is not a issue of error, but a Constitutional issue of great magnitude as this power is reserved to the judical, not Excecutive Brand and prejudiced the petitioner by depriving him of his legal and proper parole criteria. The petitioner is elligible for parole under Title 18 U.S.C. 4208 (a)(2)(1970), statutory parole elligibility criteria 28 C.F.R. 2.18 and petitioner should be released on parole. The petitioner states that in absence of the guidelines which were illegally adopted, the Parole Board (Now Commission) had no legal alternative but to consider petitioner for parole under the criteri as described in 28 C.F.R. 2.18 and its failure to do so deprived him of Due Process for he met such criteria, as can be seen by the sentencing remarks and Progress Report. The imposition of illegal guidelines is a clear violation of the Ex Post Facto Clause of the Constitution. In 1973 the Parole Board (Commission) promulgated guidelines, similar to the P.C.R.A. of 1976 the first legistlative authorization. Guidelines contrary to the intent of Congress and appropriate release criteria. In PICKUS v THE UNITED STATES BOARD OF PAROLE, 165 U.S. App. D.C 284, 507 F.2d 1107 (1974) the guidelines were held subject to the Administrative Proceedure Act and "calculated to have a substantial effect on ultimate parole decisions", "the guidelines had an even greater impact on an inmates chance of parole". The legislature can not retroactively without offending the Ex Post Facto Clause of the Constitution, substantially decrease parole elligibility by legistlation nor can they escape by deligation such limitation on their power.

The house Bill made no implication that the guidelines approached in establishin classes of offenders based on the Parole Commission views of the severity rating of "offenses was to be ratified by legislation....comments during floor debates manifest hostility to such an approach. In contrast, the senate version anticipated "identical with those in existance under the parole board which would guide the Commission in deciding wether the presequisites for parole exist:"A reasonable probability that such person will remain at liberty, without violating the law" and "release is not in compatable with the welfare of society". The decision was to be made substantially on "A report by the proper institutional officer", and the Commission's investigation....Criteria meet by Matthews. Determinations of what is meant by "would not depriciate the seriousness of the offense or promot disrespect for the law" that, to the extent possil are not in consistent with findings of the other parole decisions. It is thus apparent that the 1976 PCRA guidelines are "illegal" and in the instant of Matthews violated the "Ex Post Facto Clause" of the Constitution....which do all guidelines as applied.

Matthews meeting the parole release criteria instead found illegal second sentenci decision made by the parole board (Commission).....ignoring all documents presented.... as noted, FBP adopted there program plan inititated by Matthews, Judge Marsh in the wisdom of the Court and his sentencing has mandated the parole elligibility 4208 (A)(2) and that these were met in the instance of Matthews. (Exhibit 2)

"I don't think punishment will do any good to this gentlemen. I don't see any indication that rehabilitation is necessary." It is inconcievable that the board (Commission) failed to note the "Ex Post Facto" issues of applying the 1976 PCRA guidelines in force in April 1978 to a prisoner sentenced in 1975 for a 1971 offense prior to the guidelines when the parole release criteria were met.... and ignoring documents while making a illegal second sentencing decision, yet stating "no decision out-side the guidelines is warranted.

Citing in all arguements JOHN M. GERHARATY, et seq. 579 F.2d 238 (1978), the Parole Board (Commission) is bound by its own Rules and Regulations in considerations for parole, and the laws and constitution of the United States. The key factor intended by congress, Man E. Collar, the author of the parole statute, and its provision Title 18 U.S.C. 4208 (a)(2) in determining release was "Performance". An (a)(2) prisoner receives his inital consideration for parole shortly after completion of his prison classification study and generally within 90 days. In impossing sentence, U.S. v ZACHARIUS, the judge explained "you are sentenced under Title 4208 (A)(2) which means that the Board may determine your elligibility for parole, it depends on your behavior..." Attorney General Lawrence stated the 4208 (a)(2) would enable the sentencing judge to select a broad enough range between minium parole elligibility and maxium sentence which** could see the progress and pick the very best moment when he is best suited to go back to the community. Judge Marsh took the "Nature and Circustances into consideratic at sentencing" the parole commission is an independant statutory agency to which congress granted broad discretionary powers in parole elligibility determinations, absent of an abuse of amounting to a denial of a Constitutional Right, and a decision that is clearly inconsisent with the broad statutory criteria as in this instance the courts will not intervene, U.S. v FREDERICK, 405 F.2d 129 (3rd Cir. 1968). Sentencing Judges using "4208 (a)(2) have done so in expectation that the (Board) will consider prison performance in deciding to grant early parole." "The Parole Board ~~+++~~determines, based on all significant factors, whether the defendants response to the institutional program has been such that release on parole is warramted". UNITED STATES v ZACHARIAS, 365 F.2d 256, 257 (S.D.N.Y. 1973).... In SHADID v CRAWFORD, 430 F.Supp 126 (1977) the court held "A refusal to consider the recommendation suggested by a (b)(2); (sentence formaly (a)(2)) and the recommendation of the staffs of the concerned institutions is, in the opinion of this court a blind abrogation of the duties vested in the Commission (Board) by law and the sentencing court", special consideration failure to consider as in this instance, the inmates performance strips 4208 (a)(2) of the purpose it was intended to serve, as can be seen from the progress report of R. Olson, case worker where parole was recommended, depriving the petitioner of the intend and criteria for parole consideration of the 1954 Parole Act as well as the 1970 Act, A illegal second sentencing decision in violation of the laws, and Constitution of the United States....in violation of the petitioners rights as he was elligible for parole.

Even the imposition of the 1973 Guidelines for the instant offense of August 26, 1971 violated the Ex Post Facto Clause of the Constitution. The Guidelines, 1976 P.C. R.A. are illegal, violate the intent of Congress and"Ex Post Facto Clause" of the Constitution. The petitioner was sentenced for the instant offense of August 26,1971 at 74-27 on April 23,1975. The Legislative history of the present system is contrary to the inten of Congress as the bills differed. There is no clear authorization in the P.C.R.A. for the United States Parole Commissions assumption of judical and legistlative functions; parole has been seen as helping reintegrate into society as constructive individuals.

The P.C.R.A. does not authorize disregard of judical sentences, including parole criteria in determining parole, thedetermination of the proper range of punishment which may be levied in regard to a class of crime like the determination of what actions are criminal, is within the ambit of legistlative perogative and with respect to Ex Post Fact law, the test is not whether the punishment is within the outer limits of the law at the time of the crime, byt whether the other standard is more onerous than earlier. U.S. CA. art 1, 9, cl 3, 10, cl 1. The clause reachs beyond mere formal alterations in criminal law and it cannot retroactively, without offending the Ex Post Facto Clause substantiall decrease Parole Elligibility by legistlation and a similar prohibition applies to an increase brought about by Rule-Making. The Guidelines are contrary to the intent of Congress and 18 U.S.C. 4206 (a) (1976); illegal and a violation of the Ex Post Facto clause as to one sentenced in 1975 for a 1971 crime; and meeting the parole elligibility criteria of 4208 (a)(2) as does the petitioner. In 1973 the parole board promulgated guidelines similar to those of the 1976 Act which granted the Parole Commission the power and duty to : Promulgate rules and regulations establishing guidelines for the power (to grant or deny parole), these guidelines are to be used in making parole decisi in accordance with statutory criteria:

> (A) If an elligibility prisoner has substantially observed the rules of the institution or institutions to which he has been confinded, and if the Commission, upon consideration of the nature and circumstances of the offen and the history and characteristics of the prisoner, determines:
>
> 1) That the release would not depriciate the seriousness of his offense or promote disrespect for the law; and
>
> 2) The release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203 (A) (1), such prisoner shall be released.

The statutory mandate "nature and circumstances of the offense and the history and characteristics of the prisoner" is denied as individual consideration is not given by the Commission who replies that nothing in the statutes explicitlly contains its discretion....there is however, major disparity in the legistlation.

In 1973, the parole board (Commission) promulgate guidelines, the first legislative authorization was contained in the P.C.R.A. of 1976 which granted the Commission the power and duty to promulgate Rules and Regulations establishing guidelines for the power (to grant or deny parole). 18 U.S.C. 4203 (a)(2)(1976) these guidelines are to be used in making parole decisions in accordance with statutory criteria.....in the instance of the petitioner not even these criteria which violated the Ex Post Facto Clause of the Constitution were applied, as the petitioner "had substantially observed the institutional Rules" and no "Consideration (given) of the circumstances of the offense;" As seen by the sentencing. The Parole Commission instead made a "illegal sentencing" decision, applying "illegal guidelines" in violation of the Ex Post Facto Clause. Citing GERAGHTY vs U.S. PAROLE COMMISSION, 579 F.2d 238 (1978) et. seq. On January 18,1978, Matthews was classified and the program he had initiated adopted (exhibit 10)....his sentence computation sheet amending his parole elligibility to Title 18 U.S.C. 4205 (b)(2) having been prepared January 17,1978 (exhibit 2). This change was immediately called to the institutional staffs attention who stated no change would be made as the parole elligibility (4208 (a)(2)—4205 (b)(2) were the same (including parole criteria) in all respects On April 18,1978 the inital parole hearing was held with the parole elligibility consideration and law of the 1976 PCRA.... Title 18 U.S.C. 4205 (b)(2), its criteria and guidelines (exhibit 3). The inital parole hearing should have been in February 1978...within the statutory 90 days for (a)(2) sentences where he was delived December 22,1978. The Parole Commission states that 4208 (a)(2) and 4205 (b)(2) are the same recognizing the parole elligibility of Matthews, was 4208 (a)(2) and but conducted the inital parole hearing within the 120 days for (b)(2) sentences and applying the PCRA and its statutes.

All favorable commentary (institutional staff) and documentation, was ignored, including the thrust of the court at sentencing as the parole board made a illegal second sentencing decision applying the guidelines in effect in April 1978 and its severity rating of 55+ months—Greatest II. (note Matthews salient factor score 10 points). The memorandum of June 20,1978 of Patrica L. Smith, Case Analyst states "he would have been placed in greatest at the time (sentenceing) with no maximum rabge of months to served. No base for relief" such also being true under greatest II with no maximum range. Let in this instance "Ex Post Facto Law" for the petitioner, if guidelines are to be applyed would cited the rational and law contained in the United States of America ex rel Thumen L. Jacoby, 442 F.Supp. 144 (1977) and would cite that in the instance of murder, the parole examiner panel stated "you have a salient score of 10+4 guidelines established by the Commission for adult cases which consider the above factors indicate a range of 36 or more months to be served before release for cases with good institutional programs performance and adjustment." (Parole Action part A, worksheet, P1 Smith and Related).

Very high severity behavor calls for a guideline of 26 to 36 months and petitioner states this classification would apply.....A statement that release would "depriciate the seriousness of the offense" is not a adequate reason, once the "greatest" prisoner is beyond "the very high guidelines." The petitioner would state that he met all proper criteria for release on parole. In notice of action of May 11,1978 the Commission states your offense behavior has been rated as greatest II serverity because the offense involv substantial risk of death by explosive detination ++++guidelines indicate a range of 55+ months to be served +++ with good institutional program performance and adjustment. At the (re)consideration hearing shown in April 1982 (statutory interim hearing—April 1980 the petitioner would have served 53 months before recieveing (re)consideration contray t the intent of (a)(2) sentencing and it is likely that the petitioner would serve over 60 months (1/3) before consideration. (58 months per/ R. Vincent, Regional Comission 5/3/7 for a profit motivated ($150,000) contract (no) murder but co-defendant injured. And financial documents showing the lack of financial intrest. (exhibit 11) The District Court errored in its opinion of 10/17/78, missing the thrust of the issues at 78-599..... ..in itd reliance on West. Supp. 1977. The petitioner unlearned at law stated the parole board (commission) on April 18,1978 gave him a 55 + months set off before he would be elligible for parole.....with re-consideration of approximately 58 months (+,-) plus or minimum, (reg. Commissionor 5-3-78).... and recommend(ed)ation. Continue for a four year reconsideration hearing (pp 03, 1460 (5-3-70) .... in this instance +55 months for parole elligibility and its recommendation. Their is great probability that the prisoner will have served more than one third of his sentence prior to recieving "meaningful" considera ion for parole..... As a result of the parole boards application of its "illegal" guideli es. The court states the parole commission and re-organization, effect May 14,1976, re-codified 4208 (a)(2) intact at 18 U.S.C. 4205 (b)(2) (West, Supp.1977). See pub. Law no. 74-233, 90 stat 219...missing the thurst of the petitioners arguement or an error in the courts interpretation of the appropriate laws covering. The petitioner grants that the language of 4205 (b)(2) and 4208 (a)(2) are similar, but the law, and statutes, intent ar dis-similar from this point for:

1. Under a (a)(2) the initel parole hearing is to be conducted within 90 days (statutory) not the 120 days of (b)(2) sentences. and

2. The criteria for release for (a)(2) sentence is decribed in 28 CFR 2.18 (original statutory)....different totally from that of (b)(2) sentences with their illegal "guidelin " to establish customary release dates.

3. The key factor intended by Congressman E.Cellar, the author of the 4208 (a)(2) provision in consideration for parole is "performance," although performance on a limited basis by the commission 28 FR 2...."A rule governing decisions to advance a presumptive release date."

The provisions although similar in words are not similar in their intent, nor criteria for release....The statutes statutes as a whole are dis-similar. That the Parole Board (Commission) guidelines applied were incorrect. The instant offense leading to the indictment and conviction of the petitioner occurred August 26,1971 and for which he was originally arrested May 23,1973 (Complaint-Mag. Mitchell). The petitioners trial being held in 1975, being convicted March 6,1975 and sentenced April 23,1975. The petitioner commenced serving his sentence December 1,1977. The petitioner would refer the Honornable Court to the Guidelines, affidavit of Maurice H. Sigler and Law as found in BATTLE v NORTON, 365 F.Supp 925 (1973) which provide guidelines for catagory E.Very High Severity of 26--36 months which the petitioner states would be applicable in the instance. (exhibit 6)

However, the petitioner would point to catagory F. Greatest severity offense and its application to him with a salient factor score of (10) and cite UNITED STATES Ex REL. JACOBY v ARNOLD, 442 F.Supp 144 (1977) and the rationale of the Court in that the High side of the guideline range for Very High Severity would apply in this instance for "Parole elligibility." This being thirty-six months. It should be noted that the Parole Board recognized the greatest severity issue (6/20/78) but failed to grant relie although no decision out-side guidelines was felt in order....Hearing / Notice of Actio worksheet (see exhibits 9 et'al).

The Parole Board (now Commission) denied him of assistance of counsel by its Actions, the Kansas University Law School Prisoners Defender Project contacted the United States Parole Commission as authorized, contacted the Commission advising "they provide legal counsel and assistance", "Prepare the necessary documents and attempt to get coubsel appointed." The Commission was notified of this relative to the National Appeal and although the requests were acknowledged.....the information was not furnishe in a timely manner. Denying the petitioner of their assistance in his National Appeal and in access to the Courts (exhibits 7 et seq.). The Commission complied with the various requests after its National Appeals Decision of (exhibit 8).

IN THE SUPREME COURT OF THE
UNITED STATES TERM 19

UNITED STATES OF AMERICA Respondent. Vs. FRANCIS D. FERRI, et al, KENNETH R. MATTHEWS, Petitioner.	CRIMINAL NO: 74-277 APPELLATE NO: 78-2370 DISTRICT COURT NO: 78-599 (W. Pa)

PRO SE APPENDIX ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

MOTION FOR VACATION OF SENTENCE

S/ Kenneth R. Matthews

KENNETH R, MATTHEWS
PEMBROKE STATION
DANBURY, CT 06810

INDEX

1. Judge Marsh opinion at 78-599 (8/31/78)
2. Judgement and Commitment order 4/23/79
3. Judge Marsh sentenceing remarks
4. Sentence Computation sheet 1/17/78
5. Affidavit, Parole Commission
6. Guidelines and affidavit
7. Kansas Defender letters 8/28/78, 9/27/78, 10/18/78 et all
8. Letter / Dawson / 1/19/79
9. Parole Action part A, work sheet, et al
10. Classification / Prégram
11. R. Vincent

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal No. 74-277
	)	
KENNETH R. MATTHEWS	)	(Civil Action No. 78-599)

OPINION

Defendant Kenneth R. Matthews submitted a petition for writ of habeas corpus under 28 U.S.C. § 2241 naming "Irl Day, Warden" as respondent (Document No. 217). The petition is being treated by the court as a motion to vacate pursuant to 28 U.S.C. § 2255.*/

Defendant alleges that the guidelines and salient factors used by parole authorities in determining a release date for defendant have been changed between the time defendant was sentenced on April 23, 1975, and the time defendant began serving his sentence on December 1, 1977. Defendant argues that the parole guidelines call for 55 months imprisonment, that such guidelines are in excess of one-third of defendant's sentence, and that the guidelines therefore frustrate the sentencing intention of the court. Defendant also alleges that although the court specified that he was to be eligible for parole under § 4208(a)(2) of Title 18, U.S.C., the parole authorities have amended his sentence to provide that he is to be eligible for parole under § 4205(b)(2) instead.

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*/ See Order of Court dated June 5, 1978. Defendant previously has filed motions to vacate his sentence at Civil Action No. 76-837, Civil Action No. 77-1350, and Civil Action No. 78-449.

The court notes that, contrary to defendant's assertion, a prison term of 55 months is less than one-third of defendant's 15-year sentence. The court also notes that The Parole Commission and Reorganization Act, effective May 14, 1976, recodified § 4208(a)(2) intact at 18 U.S.C.A. § 4205(b)(2) (West Supp. 1977). See Publ.L.No. 94-233, 90 Stat. 219.

A review of the transcript of the sentencing proceedings on April 23, 1975, indicates that the court's intention was that defendant would be eligible for parole at the discretion of parole authorities who would decide

> "whether to keep him in prison for at least a third of his sentence or all of his sentence or let him out when they think he should be let out."

(Transcript, p. 12). The court finds that this sentencing intention has not been thwarted by new parole policies, and the court concludes that defendant is not entitled to the requested relief. See Musto v. United States, 571 F. 2d 136, 137 (3rd Cir. 1978); United States v. White, 540 F.2d 409, 411 (8th Cir. 1976).

An appropriate order will be entered.

October 17, 1978
Date

Robert J. Marsh
United States District Judge

cc: Kenneth R. Matthews
#33195-138
P.O.Box 1000
Leavenworth, Kansas 66048

Thomas Crawford
Asst.U.S.Attorney
633 U.S.Courthouse
Pittsburgh, Pa. 15219

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	
vs.	)	Criminal No. 74-277
	)	
KENNETH R. MATTHEWS	)	(Civil Action No. 78-599)

ORDER OF COURT

AND NOW, this 17th day of October, 1978, the defendant having filed a petition for writ of habeas corpus which is being treated by the court as a motion to vacate pursuant to 28 U.S.C. § 2255, and after review of the files and records of this case it appearing to the court that defendant is not entitled to the requested relief and that a hearing on this matter would serve no purpose, IT IS ORDERED, ADJUDGED AND DECREED that the motion be and the same hereby is denied.

Robt J. Marsh
United States District Judge

cc: Kenneth R. Matthews
#33195-138
P.O.Box 1000
Leavenworth, Kansas 66048

Thomas Crawford
Asst.U.S.Attorney
633 U.S.Courthouse
Pittsburgh, Pa. 15219

United States of America vs.

DEFENDANT: (3) KENNETH R. MATTHEWS

33195-138

United States District Court

WESTERN DISTRICT OF PENNSYLVANIA

DOCKET NO. 74-277 Criminal

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: April DAY: 23 Y: 19

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desi have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[xx] WITH COUNSEL Sidney Baker, Esq. (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [xx] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [xx] GUILTY.

Defendant has been convicted as charged of the offense(s) of Count One: 18 U.S.C. 371 and 844(1). Count Two: 18 U.S.C. 844(1) and 2. Count Three: 18 U.S.C. 1341. Count Four: 18 U.S.C. 1341. Count Five: 18 U.S.C. 1341. Count Six: 18 U.S.C. 1341. Count Seve 26 U.S.C. 5861(d) and 5871, and 18 U.S.C. 2. Count Eight: 26 U.S.C. 5861(c) and 5 and 18 U.S.C. 2. Count Nine: 26 U.S.C. 5861(f) and 5871, and 18 U.S.C. 2.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the co was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defenc hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) as to Count One. IT IS ADJUDGED that as to Count Two the defendant is hereby committed to the custody of the Attorney General or his authorized representative f imprisonment for a period of fifteen (15) years. The dentence of imprisonment impo on Count Two shall run concurrently with the sentence of imprisonment imposed on Co One. IT IS ADJUDGED that as to each of Counts Three, Four, Five and Six the defend is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years. The sentences of imprisonment imposed on Counts Three, Four, Five and Six shall run concurrently wit each other and concurrently with the sentences of imprisonment imposed on Counts On and Two. IT IS ADJUDGED that as to each of Counts Seven, Eight and Nine the defend is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years. The sentences of imprisonment imposed on Counts Seven, Eight and Nine shall run concurrently with ea other and concurrently with the sentences of imprisonment imposed on Counts One, Tw Three, Four, Five and Six. The defendant shall become eligible for parole under 18 U.S.C.A., Section 4208(a)(2) at such times as the Board of Parole may determine. No fine. No costs.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends, that the defendant not be incarcerated in the same institution as the co-defendant Francis D. Ferri and the government witness Guy Elias Bertini.

U. S. PENITENTIARY
Leavenworth, Kansas

It is ordered that the Clerk deli a certified copy of this judgme and commitment to the U.S. M. shal or other qualified officer.

CERTIFIED AS A TRUE COPY O
THIS DATE 4-23-75
BY DEPU

SIGNED BY
[ ] U.S. District Judge
[xx] U.S. Magistrate

DEC 22 1977

RECEIVED

Date

(3)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

CHAMBERS OF
RABE F. MARSH,
JUDGE

837 UNITED STATES COURTHOUSE
PITTSBURGH, PA. 15219

November 27, 1979

Kenneth R. Matthews
Pembroke Station
Danbury, Connecticut 06810

Dear Mr. Matthews:

As I recall, you were sentenced to imprisonment for a term of fifteen years, and the sentence provided that you were eligible for parole in the discretion of the Parole Board, pursuant to Title 18, Section 4208(a)(2). Your release is strictly in the hands of the Board. You may show the hearing examiner my remarks at sentencing if you think they will help you; however, it is not in order that I undertake to influence the Parole Board in any respect.

I wish you the best of luck.

Sincerely yours,

Rabe F. Marsh

Court: Judge Marsh

The Court:

" But, I think as far as Mr Matthews is concerned, this is a one time event " (page 5, lines 3-5)

" But the testimoney was entirely circumstantial. I don't know who paid the $5,000.00 to ferri to this day and niether does the government" (pg 9) Nor does Matthews

" I don't like circumstantial evidence, (pg 9 Line 9)

" As I see it medical officers will have to examine him ++ and penolgists should take this trial and its peculiarities into consideration, "

" I don't think punishment will do any good to this gentlemen I don't think deterence will do any good to anyone else. I don't see any indication that rehabilitation is necessary." PP 12

STATES DISTRICT COURT
CHAMBERS OF
SE F. MARSH, JUDGE
NITED STATES COURTHOUSE
TSBURGH, PA. 15219

OFFICIAL BUSINESS

POSTAGE AND FEES PAID
UNITED STATES COURTS

12-2-79
5:02 P
Wm. d. T

Kenneth R. Matthews
Pembroke Station
Danbury, Connecticut 06810

73 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,]
]
Plaintiff,]
]
vs.] No. 74-277 Criminal
]
KENNETH R. MATTHEWS,]
]
Defendant.]

TRANSCRIPT OF PROCEEDINGS

of Sentence Hearing held April 23, 1975, 11:00 o'clock a.m., United States District Court, Pittsburgh, Pennsylvania, before the Honorable Rabe F. Marsh, Chief District Judge.

APPEARANCES:

On behalf of the Plaintiff:

Thomas A. Crawford, Jr., Esq.

Michael P. Lesniak, Esq.

On behalf of the Defendant:

Sidney Baker, Esq.

Margaret K. Nimless
Official Reporter.

perpetrate in the future.

Thank you, Your Honor.

THE COURT: I think that would be absolutely true in connection with Mr. Ferri, but I think as far as Mr. Matthews is concerned, this is a one-time event.

MR. BAKER: With respect to the revocation of the bond, Your Honor, I would like to bring the Court's attention that, again, there is nothing in the history of this man or in his actions which would indicate that he would be intending or would intend to flee the jurisdiction of this Court, pending an appeal, and, moreover, at the time of the actual jury verdict, the Court gave consideration as to the revocation of the man's bond at that time, and Mr. Crawford indicated that he had no belief that Mr. Matthews would flee the jurisdiction or would go anywhere at the time that the jury returned its verdict, and, certainly, if circumstances were as Mr. Crawford says, the problem would have been as great then as it is now.

We honestly feel that this man does have a substantial basis for an appeal, at least on one issue, not in connection with the trial, but in connection with the delay between the arrest and the indictment, and we honestly feel that he is a person worthy of having his bond continued.

MR. CRAWFORD: Your Honor, regarding that, the government does not submit the request because we feel that we

as well as upon this defendant.

THE COURT: But the testimony was entirely circumstantial. I don't know who paid that $5,000 to Ferri to this day, and neither does the government.

Mr. Crawford wanted to admit the polygraph expert's testimony, the polygraph expert's testimony into evidence, and I sustained your objection, although he made a very powerful argument or submitted a very powerful brief on the point, and some courts apparently are beginning to let them in.

And I can't help but think that if an F.B.I. polygraph expert would come up and tell me in a parole board that this man passed the test, I think it would have some influence.

Unfortunately, the F.B.I. doesn't do it any more, at least they don't do it around here, and I don't know who you might get as a neutral polygraph expert.

I just throw it out as something that bothers me. I don't like convictions on circumstantial evidence.

Mr. Matthews, do you have anything to say in your own behalf or present any information in mitigation of punishment?

THE CLERK: Will you come forward, Mr. Matthews please?

MR. MATTHEWS: Sir, all I could say is I would

be willing to take a polygraph test from a disinterested person. I pled not guilty before and I would plead the same today.

THE COURT: You still maintain you are not guilty?

MR. MATTHEWS: Yes. Yes, sir.

THE COURT: The jury made a mistake?

MR. MATTHEWS: In my opinion, they did, sir, and I wouldn't --- it is hard to talk with this, if you will forgive me.

They are a jury of my peers, and all I can say is there is a mathematical truth and there is a picture truth. On the mathematical truth, I believe that I am innocent. On a picture truth, you can paint a picture of either guilt or innocence.

THE COURT: Anything else?

MR. MATTHEWS: No, sir.

THE COURT: This is a very painful task. I would hate to think that I am sentencing an innocent man.

The first count, you, Kenneth R. Matthews, are committed to the custody of the attorney general for imprisonment for a period of five years.

The second count, the defendant is committed to the custody of the attorney general for imprisonment for a period of 15 years. The sentence on the second count to run

concurrently with the sentence on the first count.

Third count, fourth count, fifth count, sixth count, all charging mail fraud, on each of those counts, the defendant is sentenced to the custody of the attorney general for imprisonment for a period of three years on each count, sentences to run concurrently with each other and concurrently with the sentence on count one and count two.

For each of counts seven, eight and nine, defendant is sentenced to custody of the attorney general for a period of three years on each count, sentences to run concurrently with the sentence imposed on counts one and two, and to run concurrently with the sentences imposed on counts three through six, and concurrently with each other.

Is it plain, Mr. Wolff?

THE CLERK: Yes, Your Honor.

THE COURT: I am convinced that this man doesn't have any money, is that right?

MR. BAKER: That's correct, Your Honor. We submitted a balance sheet to Mr. Law. I have the original here, and I was going to, then, after the sentencing, discuss with the Court what our next step is with respect to this situation, considering his financial situation.

THE COURT: Well, I am considering whether I should fine him or not. I don't find that he has any assets.

MR. BAKER: The assets he has, Your Honor are

so heavily encumbered that liquidated he would be rendered insolvent, and that's part of the problem that we have.

THE COURT: Well, no costs, no fine.

Now, I think as part of the sentence I will direct that he be eligible for parole at the direction of the parole board. As I see it, medical officers will have to examine him, if he ever goes to prison, and penologists should take this trial and the peculiarities of it into consideration, as to whether to keep him in prison for at least a third of his sentence or all of his sentence or let him out when they think he should be let out.

I don't think punishment will do any good to this gentleman. I don't think deterrence will do any good to anyone else. I don't see any indication that rehabilitation is necessary.

It is just a vicious crime of attempted murder, if he is guilty of it, and he says he isn't.

Now, Mr. Matthews, I have to advise you of your right to appeal. If you are unable to pay the costs of appeal, I advise you of your right to apply for leave to appeal in forma pauperis, that is, as an indigent person.

If you so request, the clerk shall prepare and file forthwith a notice of appeal in your behalf.

MR. BAKER: If the Court please, we are making such an application. We have the original financial affidavit

U.S. DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

(4)

SENTENCE COMPUTATION RECORD

1 REGISTER NO	2 NAME (LAST, FIRST, MIDDLE)	3 INSTITUTIONS OF CONFINEMENT IN SEQUENCE (SYMBOLS)			
33105-138 A	MATTHEWS, Kenneth R.	LVN	DAN		
4 DATE OF BIRTH (MO., DAY, YR.)	5 FBI NO.	6 RACE 1 WHITE 2 BLACK 3 YELLOW 4 IND 5 OTHER		7 SEX 1 MALE 2 FEMALE	
07-05-35	954 637 K10	1		1	

8 SENTENCE NUMBER	1	2	3	4
	DOCKET NO. 74-277 CR	DOCKET NO.		DOCKET NO.
9 DATE PREPARED OR CHANGED	01-17-78			
10 DATE SENTENCED	04-23-75			
11 DATE COMMITTED BY FOLLOWING METHOD	12-22-77 INST SYMBOL LVN	INST SYMBOL		INST
12 HOW COMMITTED	101 Fed Court			
13 DISTRICT	03383 W/Penn.			
14 JUDGE	MARSH, R. F.			
15 OFFENSE	Consp; Att Damage Prop by Explosives; Rec Firearm Not Reg. T-18-371; 844(i); 1341 & T-26-5861			
16 BOP OFFENSE CODE				
17 SENTENCE PROCEDURE	13 4205(b)(2)			
18 SENTENCE IMPOSED 888888 - LIFE 999999 - DEATH	15-00-00 15 years			
19 NEW TERM OF THIS SENTENCE				
20 BASIS FOR CHANGE				
21 FINE/COSTS COMM. = 1 NOT COMM. = 2				
22 PROBATION REVOKED 1 TO FOLLOW 2				
23 JAIL CREDIT	TOTAL 0003 FROM & INCL. 05-23-73 TO & INCL. 05-24-73	TOTAL FROM & INCL. TO & INCL.		TOTAL FROM & INCL. TO &
	09-06-74 09-06-74			
24 INOPERATIVE TIME	TOTAL	TOTAL		TOTAL
25 IDENTITY SENTENCES INCLUDED IN FOLLOWING SENTENCE COMPUTATION(S) BY SENTENCE NUMBER(S)	1			
26 TOTAL TERM NOW IN EFFECT	15-00-00 15 years			
27 SENTENCE BEGAN OR WARRANT EXECUTED	12-01-77			
28 EXPIRES FULL TERM	11-27-92			
29 FULL TERM LESS 180 DAYS	05-31-92			
30 GOOD TIME ALLOWANCE AND RATE	0 800 @ 10 DA/MO	@ DA/MO		@ DA
31 MANDATORY RELEASE OR EXPIRES WITH GOOD TIME	12-24-87			
32 ELIGIBLE FOR PAROLE 555555 - NOT ELIGIBLE 666666 - BOP'S DISCRETION	66-66-66 4205(b)(2)			
33 SPECIAL PAROLE TERM	YEARS	YEARS		YEARS
34 TWO-THIRDS OR 30-YEAR DATE	11-27-87			
35 REMARKS	04-23-75 Cont on Bond			

(5)

AFFIDAVIT

Now comes Kenneth R. Matthews, who deposes and says:

1. That my sentence was improperly Amended by the F.B.P. to parole elligibility pursuant to Title 18 U.S.C. 4205 (b)(2).

2. That the United States Parole Commission effectively denied me the assistance of the Kansas Defenders Project in pursuing my National Appeal of the hearing of April 18, 1978.

3. That the Progress Report of R. Olson Recommended parole on April 18, 1978.

4. That the petitioner has made as good as possible under the particular circumstances, adjustment to prison life.

S/ Kenneth K Matthews

Kenneth R. Matthews
Pembroke Station
Danbury, Ct 06810

Exhibits.....Parole Hearing April 18,1978 /Attached

sentenced for the offence of failure to appear have been required to serve eighteen months before release. But it is apparent that in some situations parole decisions will establish a minimum sentence. Chairman Sigler acknowledges that in some cases "offense severity will so outweigh favorable risk that a prisoner serving an exceptionally short sentence will not be paroled. . . ." (Sigler affidavit 1-2).

For example, some courts, including this one, often use the provisions of 18 U.S.C. § 4208(a)(2) with respect to long sentences for armed bank robbery. This is done out of a concern that no one should be imprisoned for a long time without the availability of administrative leniency (short of the pardoning power) in the event of totally unforeseen circumstances, such as terminal illness.[8] In such event, § 4203 surely does not require the Board to release after three months (the normal time when (a)(2) prisoners are first considered for parole) a bank robber sentenced to twenty years simply because for three months he has been a model prisoner. The Board must make a judgment as to an appropriate minimum time period for such prisoners, always retaining the discretion to release at an even earlier date in the truly extraordinary case. Such an approach does not, as petitioner alleges, interfere with the sentencing jurisdiction of the courts. If a court wants a defendant to serve a brief sentence or no sentence at all, it has ample techniques for accomplishing that result.

Finally, petitioner contends that the decision to continue him to expiration violates the provisions of 18 U.S.C. § 4208(a)(2). Even if the (a)(2) provision requires not only early consideration for parole but also a periodic review of reasonable frequency, an issue not decided in this case, this petitioner has no complaint. His mandatory release date will arrive, at the latest, not quite four months after the decision to continue him to expiration. In no event is he entitled to more frequent consideration.

For the reasons stated relief must be denied to this petitioner. However, this Court expresses the hope that as the Board continues refining the new procedures it has adopted, it will take steps to make both prisoners and reviewing courts more informed about how these procedures work in individual cases. The petition is dismissed.

APPENDIX I

AFFIDAVIT

I, MAURICE H. SIGLER, being duly sworn, depose and state that:

I am Chairman of the United States Board of Parole with offices located at 101 Indiana Avenue, NW., Washington, D. C. This affidavit will set forth the method of operation of the paroling policy guidelines adopted by the Board and presently in use in parole decision making.

The Parole Board's guidelines indicate the approximate range of time to be served for various combinations of offense severity and offender characteristics. Offender characteristics refer to risk of parole violation or recidivism; in other words, there is a balancing of offense severity against risk of violation. Risk of parole violation must be included in every use of the guidelines to determine how long an individual prisoner will be held, though it may happen in individual cases that offense severity will so outweigh favorable risk that a prisoner serving an exceptionally short sentence will not be paroled, but rather released by mandatory release under the good time law.

The guideline ranges are set for cases with good institutional performance. A hearing panel may render a decision either above or below the guideline range if it is justified by a sufficient explanation. Circumstances in which the Board may consider decisions below the guid-

8. This Court has previously been advised by Chairman Sigler that an explanation from the sentencing court to the Parole Board as to the reasons for an (a)(2) sentence is helpful, since many courts mean different things by such a sentence.

lines include exceptionally good institutional performance; substantial medical problems; cases in which the subject has been in state custody for a long period on other charge(s); cases calling for deportation only; cases in which the sentencing judge has recommended early parole (Form 792); and cases in which the Board feels that the clinical risk prognosis is substantially better than indicated by the offender characteristics score. (The offender characteristics score is a predictive device, similar in principle to the actuarial tables used by insurance companies.)

That the guidelines have not curtailed use of discretion by the Board is shown by the fact that in the first four months of guideline usage in the pilot project approximately 63 percent of hearing panel recommendations were within the guidelines; 22.5 percent of panel recommendations were below the guidelines; and 14.5 percent of panel recommendations were for decisions above the guidelines.

The guidelines were designed to take into account the statutory criteria for parole consideration in the following manner:

(a) The risk scale relates to the standard of 18 U.S.C. § 4203(a) that there must be a reasonable probability that the prisoner will live and remain at liberty without violating the law.

(b) The consideration of institutional performance relates to the requirement of 18 U.S.C. § 4202 that the prisoner must have observed the rules of the institution in which he has been confined.

(c) The offense severity scale relates to the standard of 18 U.S.C. § 4203(a) that, in the opinion of the Board, release would not be incompatible with the welfare of society. For example, a prisoner who has committed a very serious offense, such as armed robbery, but who is a good parole risk (i. e., no prior record, good work history) would generally not be released after serving three months because, in the opinion of the Board, release at that time would depreciate the seriousness of the offense committed and thus be incompatible with the welfare of society. In fact, prisoners who have committed very high severity offenses who are also judged to have a very high probability of successful parole performance will not generally be released until they have served 26 to 36 months. However, it is important to stress that this is not an absolute minimum; earlier paroles may be granted where there are sufficient reasons such as those described above. Thus, the range of the guidelines is not directly comparable to judicially set minimum sentences, which may not be reduced by Board discretion. The guidelines are simply a statement by the Board of the manner in which it generally intends to exercise its discretion.

A parole system which did not take into account the severity of the offense would generally result in immediate parole grants for the most serious offenses while giving almost no chance of parole at any time for many minor offenders, since offenders who commit the most serious offenses (homicide, assault, rape) often tend to be among the best parole risks, while offenders committing certain less serious offenses (joyriding, check forgery) often tend to be among the poorest risks. Such a policy would certainly, in the opinion of the Board, be incompatible with the welfare of society.

In summary, the guideline concept attempts to generate an explicit paroling policy to lead to more equitable and consistent decisions by structuring discretion within the broad statutory mandate of the Board without removing consideration of each individual case on its merits.

(s) Maurice H. Sigler
Maurice H. Sigler
Chairman
U.S. Board of Parole

See Appendix on next page.

APPENDIX 2

GUIDELINES FOR DECISION MAKING: (ADULT CASES)
AVERAGE TOTAL TIME SERVED BEFORE RELEASE
(INCLUDING JAIL TIME)

Offense Characteristics*	Offender Characteristics: Salient Offense/Likely Parole Prognosis (Probability of Favorable Parole Outcome)			
	(9-11) Very High	(6-8) High	(4-5) Fair	(0-3) Low
Category A—Low Severity Offenses: Immigration law violations; Walkaway; Minor theft (includes larceny and simple possession of stolen property less than $1,000)	6 to months	9-12 months	10-14 months	12-16 months
Category B—Low Moderate Severity Offenses: Alcohol law violations; Selective Service; Mann Act (no force; commercial purposes); Theft (non mail; forgery; Fraud (less than $1,000); Possession of marijuana (less than 5 lbs); Passing Possession of counterfeit currency (less than $1,000)	8-12 months	12-16 months	16-20 months	20-25 months
Category C—Moderate Severity Offenses: Simple theft of motor vehicle (not multiple theft or for resale); Theft, Forgery Fraud ($1,000-$20,000); Possession of marijuana (50 or more); Possession of other "Soft Drugs" (less than 1 kilo); Sale of marijuana (less than 25,000); Sale of other "Soft Drugs" (less than $500); Possession of "Heavy Narcotics" (by addict—less than $500); Receiving stolen property with intent to resell (less than $20,000); Embezzlement (less than $20,000); Passing Possession of counterfeit currency ($1,000-$20,000); Interstate transportation of stolen bonds/securities (less than $5,000)	12-16 months	16-20 months	20-24 months	24-30 months
Category D—High Severity Offenses: Theft, Forgery Fraud (over $20,000); Sale of marijuana (25,000 or more); sale of other "Soft Drugs" ($500-$5,000); Sale of "Heavy Narcotics" (to support own habit); Receiving stolen property ($20,000 or more); Passing Possession of counterfeit currency (over $20,000); Counterfeiting; Interstate transportation of stolen bonds/securities ($5,000 or more); Possession of "Heavy Narcotics" (by addict; Cost or more); Sexual act (bodily injury); Burglary (Bank or Post Offices); Robbery (no weapon or injury); Organized vehicle theft	16-20 months	20-26 months	26-32 months	32-38 months
Category E—Very High Severity Offenses: Extortion; Assault (serious injury); Mann Act (force); Armed robbery; Sexual act (force; injury); Sale of "Soft Drugs" (other than marijuana; more than 1 kilo); Possession of "Heavy Narcotics" (more than 1 kilo); Sale of "Heavy Narcotics" (for profit)	26-36 months	36-45 months	45-55 months	55-65 months
Category F—Greatest Severity Offenses: Aggravated armed robbery (no other felony; weapon fired or serious injury during offense); Kidnapping; Willful homicide	(Information not available due to limited number of cases)			

* Notes: (1) If an offense behavior can be classified under more than one category, the most serious is, plainly, appropriate. (2) If an offender behavior involved multiple separate offenses, the severity level may be increased. (3) If an offense is not listed above, the proper category may be obtained by comparing the severity of the offense with those of similar offenses listed. (4) If a continuance is to be recommended, allow 30 days (1 month) for release program provision.

THE KANSAS DEFENDER PROJECT
The University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045
Area Code 913 864-5571

(7)

SEP 11

Professor Ira P. Robbins, Director

7 September 1978

Regional Director
U.S. Parole Commission
K.C.I. Bank Building
8800 N.W. 112th Street
Kansas City, MO 64153

RE: Kenneth R. Matthews
Reg. No. 33195-138

Dear Sir:

Please be advised that as of this date I have yet to receive a copy of the two-part Notice of Action requested in my letter of August 28, 1978, to your office. Inasmuch as we cannot file the national parole appeal for Mr. Matthews until that document is in our possession, I would appreciate your cooperation in expediting the forwarding of it to me. If there are any complications that I have not yet been informed of, please notify me.

Thank you for your cooperation in this matter.

Sincerely,

Hal D. Meltzer
Student Director

HDM/jd

September 18, 1978

Mr. Hal D. Meltzer
Student Director
The Kansas Defender Project
The University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045

Re: Kenneth R. Matthews
Reg No. 33195-138

Dear Mr. Meltzer:

This is to acknowledge receipt of your letter, dated August 1978, on behalf of Mr. Matthews' appeal before the National Appeals Board.

If you desire a copy of the Notice of Action from the previous decision of the Regional Office, it will be necessary to have a written consent form from Mr. Matthews sent to the U.S. Parole Commission, 320 First Street, N.W., Washington, D.C. 20537.

A decision in his case should be reached by the end of October.

Sincerely,

LEE H. CHAIT, Analyst
National Appeals Board

LHC:mam

THE KANSAS DEFENDER PROJECT
The University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045
Area Code 913 864-5571

Professor Ira P. Robbins, Director

U.S. PAROLE COMMISSION
CENTRAL OFFICE
Oct 21 '78

18 October 1978

RECEIVED
NAB
OCT 23 1978
U.S. PAROLE COMMISSION

Lee H. Chait
U.S. Parole Commission
320 First Street, N.W.
Washington, D.C. 20537

RE: Kenneth R. Matthews
#33195-138

Dear Mr. Chait:

I am a member of the Kansas University Law School Prison Defender Project, a clinical program through which law students provide legal counsel and assistance to inmates of Leavenworth Federal Penitentiary and Lansing State Penitentiary. Our primary function is to determine whether an inmate has a legal remedy available by attempting to verify the information he or she has furnished and conducting the appropriate legal research. If there is a remedy available, we prepare the necessary documents and attempt to get counsel appointed to handle the case.

Please send me a copy of the two-part Notice of Action from the Regional Parole Commission decision this summer regarding Kenneth Matthew's parole appeal. Enclosed is Mr. Matthew's authorization for release of this information to the Kansas Defender Project.

Thank you.

Sincerely,

Kevin M. Malone

Kevin M. Malone
Student Counsel

KMM/jd

Enclosure

January 19, 1979

Mr. Kevin M. Malone
Student Counsel
The Kansas Defender Project
The University of Kansas School of Law
Green Hall
Lawrence, Kansas 66045

RE: MATTHEWS, Kenneth R.
33195-138

Dear Mr. Malone:

This letter is in further response to your communication requesting a copy of the Notice of Action regarding your client, Mr. Kenneth R. Matthews. Enclosed please find said notice.

The Commission regquests the delay in providing this document to you. However, as mentioned in our letter of September 27, 1978, Mr. Matthews' file has been in Washington, D. C., for processing of the national appeal.

Sincerely,

William D. Dawson
Administrative Hearing Examiner

JKL/mjw

Enclosure

Parole Form H-1
(Rev. April, 1977)

UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537

NOTICE OF ACTION

Name MATTHEWS, Kenneth R.

Register Number 33195-138 *Institution* Leavenworth

In the case of the above-named the following action with regard to parole, parole status, or mandatory release was ordered:

Continue for a four year reconsideration hearing in April, 1982.

(Reasons for continuance or revocation) (Conditions or remarks)

Your offense behavior has been rated as Greatest II severity because the offense involved substantial risk of death by explosive detonation. You have a salient factor score of 10. You have been in custody a total of 04 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 55+ months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted. As required by law, you have also been scheduled for a statutory interim hearing during April, 1980.

Appeals procedure: You have a right to appeal a decision as shown below. Filing the appeal is your responsibility which others cannot perform for you. Forms for that purpose may be obtained from your caseworker, or the Regional Office of the Commission, and must be filed with the Commission within thirty days of the date this Notice was sent.

A. Decision of a Hearing Examiner Panel. Appeal may be made to the Regional Commissioner.

B. Decision of the National Commissioners when referred to them for reconsideration. Appeal may be made to the Regional Commissioner.

C. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal may be made to the Regional Commissioner.

D. Decision of the Regional Commissioner. Appeal may be made to the National Appeals Board.

E. Decision of National Commissioners in cases where they assumed original jurisdiction. Appeal may be made to the entire Commission.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies may also be sent to the sentencing court. You are responsible for advising any others to whom you might wish to make information on this form available.

May 11, 1978 (Date Notice sent) North Central (Region) (NAB) (Nat. Dir.) L. Jackson (Docket Clerk)

COMMISSION COPY

EXHIBIT B

NOTICE OF ACTION WORKSHEET

NAME Matthews, Kenneth R. REGISTER NUMBER 33175-13

REASONS: (Circle and complete each applicable reason)

1. YOUR OFFENSE BEHAVIOR HAS BEEN RATED, GREATEST II SEVERITY BECAUSE THE OFFENSE INVOLVED SUBSTANTIAL RISK OF DEATH BY EXPLOSIVE DETONATION

YOU HAVE A SALIENT FACTOR SCORE OF 10 YOU HAVE BEEN IN CUSTODY A TOTAL OF 4 MONTHS. GUIDELINES ESTABLISHED BY THE COMMISSION FOR (ADULT) ~~(YOUTH/NARA)~~ CASES WHICH CONSIDER THE ABOVE FACTORS INDICATE A RANGE OF 55-7 MONTHS TO BE SERVED BEFORE RELEASE FOR CASES WITH GOOD INSTITUTIONAL PROGRAM PERFORMANCE AND ADJUSTMENT. AFTER REVIEW OF ALL RELEVANT FACTORS AND INFORMATION PRESENTED,

(a.) A DECISION OUTSIDE THE GUIDELINES AT THIS CONSIDERATION IS NOT FOUND WARRANTED.

b. A DECISION (ABOVE) (BELOW) THE GUIDELINES AT THIS CONSIDERATION APPEARS WARRANTED BECAUSE .....

.....

.....

c. IT IS FOUND THAT YOUR RELEASE AT THIS TIME WOULD DEPRECIATE THE SERIOUSNESS OF YOUR OFFENSE BEHAVIOR. COMMISSION GUIDELINES FOR GREATEST II SEVERITY CASES DO NOT SPECIFY A MAXIMUM LIMIT. THEREFORE, THE DECISION IN YOUR CASE IS BASED IN PART UPON A COMPARISON OF THE RELATIVE SEVERITY OF YOUR OFFENSE BEHAVIOR WITH THE OFFENSE BEHAVIORS AND TIME RANGES SPECIFIED IN THE GREATEST I SEVERITY CATEGORY.

2. OTHER .....

.....

(3.) AS REQUIRED BY LAW, YOU HAVE ALSO BEEN SCHEDULED FOR A STATUTORY INTERIM HEARING (DURING APRIL 1980.) ~~(AT THE COMPLETION OF THE MINIMUM TERM).~~

4. YOUR PRESUMPTIVE PAROLE DATE IS CONDITIONED UPON YOUR MAINTAINING GOOD INSTITUTIONAL CONDUCT AND THE DEVELOPMENT OF A SUITABLE RELEASE PLAN. PRIOR TO RELEASE YOUR CASE WILL BE SUBJECT TO REVIEW TO ASCERTAIN THAT THESE CONDITIONS HAVE BEEN FULFILLED.

5. IN NARA CASES, A PAROLE DATE IS ALSO CONTINGENT UPON CERTIFICATION OF RELEASE READINESS BY THE SURGEON GENERAL.

NOTES:

a. Explain the severity rating for all Greatest II severity cases, all cases in which the offense behavior is not clearly listed on the guideline chart, and all cases in which the severity rating is increased or decreased due to aggravating or mitigating circumstances, giving specific facts.

b. For Greatest II severity cases, if the applicant has not yet reached the lower limit of the guideline range, and the decision is to be within the guidelines, use reasons [1a+c]. If a decision below the guidelines is warranted, use reason [1b]. If the applicant has reached the lower limit of the guideline range, use reason [1c] and—where applicable—supplement with reason No. 2.

c. Use the phrase "at the completion of the minimum term" in Item 3 only in those cases where the statutory interim hearing is to be deferred to the minimum term [See 28 C.F.R. 2.14 (a)(2)].

FPI-NAR—1-10-78

June 30, 1978

memorandum

Patricia L. Smith
Case Analyst

U. S. Parole Commission
North Central Region
Kansas City, Mo. 64153

SUBJECT: MATTHEWS, Kenneth
33195-138

TO: Commissioner

Subject contends the Commission did not follow the intent of the sentencing judge (see attached copy of portion of court transcript). Apparently subject was convicted on circumstantial evidence by a jury, and judge was wrestling with his conscience when he sentenced the man.

The actual money amount of the offense did not determine the severity of the offense behavior, although subject mentions that the figure in the PSI is erroneous. Claims there is no way he could have profited $100,000 of the $150,000 insurance involved. Offense was rated greatest II because of attempted murder by subject contracting two individuals to place a bomb under a third individual's car. Although the intended victim was not injured, the codefendant who placed the bomb was hurt when the bomb accidentally exploded.

Not mentioned in the hearing summary or on BP.5 is the fact that subject is also serving a concurrent sentence for Mail Fraud. This is multiple offense behavior (counts 3, 4, 5, 6 were for Mail Fraud).

Subject contends that amendment of the parole guidelines since his sentencing date adversely affected him. He would have, however, been placed in Greatest at that time with no maximum range of months to serve. No basis for relief.

Recommend: Affirm previous decision. Both lower & Diff criteria

VEM/mjy

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

OPTIONAL FORM NO. 10
(REV. 7-76)
GSA FPMR (41 CFR) 101-11.6
5010-112

ANALYST'S EVALUATION

LF:mab
10/5/78

NAME: MATTHEWS, Kenneth R. Reg. No. 33195-138 Inst. Leavenworth

OFFENSE: Conspiracy; Receiving Unregistered Firearm; Maliciously Damaging Property by Means of Explosives and Mail Fraud

Length of Sentence: 15 yrs (b)(2) Began: 12/1/77 + 3 Days JT

MR Date: 12/15/87 FT Date: 11/27/92

Severity: Greatest II

SF Score: 10 Guideline Range 55+ mos. IN Custody 10 mos. at time of hearing

This case is properly before the N.A.B. pursuant to 28 C.F.R. 2.26

DESCRIPTION OF OFFENSE: Subject and another individual formed two corporations; subject was to become president of both. Both businesses were unsuccessful and subject took out life insurance on his business partner in the amount of $150,000 ($100,000 payable to one company and $50,000 payable to the other company). During the trial the government presented evidence to the effect that subject contracted one codefendant to take the life of his partner. The codefendant and a co-offender were to plant a bomb in the business partner's auto. The codefendant pointed out the car to the co-offender who placed the explosive under the seat of the car. While pushing the explosive under the seat it was detonated and the force of the explosion amputated the co-offender's hand and part of his upper arm.

BASIS OF APPEAL: Guidelines incorrectly applied; offense severity rating; reasons do not support decision; there are mitigating circumstances to render a more lenient decision; decision based on erroneous information (claims insurance on partner would not provide him any monetary gain); Commission ignored sentencing judge's remarks.

EVALUATION OF APPEAL: Total offense circumstances warrant placement in Greatest II; do not see any reason to render a more lenient decision; does not submit any hard evidence to substantiate claim that insurance would not provide monetary gain. Sentencing judge notes subject maintains his innocence and places determination for release with the Commission.

UNITED STATES DEPART T OF JUSTICE
BUREAU OF P SONS

CLASSIFICATIO STUDY
(Continue

Committed Name: MATTHEWS, Kenneth R. Regist No.: 33195-138 Date: January 20, 1978

Institution: USP, Leavenworth D.O.B.: 7-5-35
Date Classified: 1-18-78 Age: 42

STAFF SUMMARY

CURRENT OFFENSE & PRIOR RECORD: Mr. Matthews was convicted of Conspiracy and Maliciously Damaging by means of Explosives and Mail Fraud. Mr. Matthews alledgedly contracted Francis D. Ferri, to take the life of Lynn Dunn. Mr. Dunn was insured for $150,000, with the beneficiary being two companies which Mr. Matthews was President of. During the attempt to place the dynamite and blasting caps in Mr. Dunn's automobile the explosives were detonated, injuring one of Mr. Matthews codefendants. Prior to this offense, Mr. Matthews brush with the law has been a hit and run charge when Mr. Matthews was 17 years old. At this time Mr. Matthews has no detainers or charges pending against him.

SOCIAL SITUATION: Mr. Matthews was the second of two sons born to Geraldine and William Art Matthews. His parents were divorced in 1936, and Mr. Matthews had no further contact with his father. His mother was a school teacher, and it appears that she was able to adequately satisfy the need of her family. Mr. Matthews graduated with a Bachelor Science Degree in Business Administration, from Duquesne University, Pittsburgh, Pennsylvania, on January 25, 1958. Since 1963, he was reported to be self employed Insurance Agent. He lists assets in the amount of $137,856 which consist mostly of real estate, liabilities which amount to $147,750. Mr. Matthews has had a history of back problems and has a cervical spine problem that could lead to serious neurological damage. At this time Mr. Matthew does not appear to have any emotional problems, other than he is highly nervious. He claims he has no history of drug or alcohol abuse.

RECOMMENDED PROGRAMS: At the present time Mr. Matthews is involved in the counseling program here at the institution. He is enrolled in two college psychology courses. The Classification Team believes that Mr. Matthews should continue with his present program.

COMMUNITY RESOURCES: Upon his eventual release, Mr. Matthews should have a number of community resources available to him. He owns a home, in which his wife and child now reside. He should be able to return to his previous employment as an Insurance salesman, with very little trouble.

Dictated by J.M. Junk, Case Manager
db

Classification Form 10
Revised July 1975

Attachment C
7200.17
10-23-75

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

PROGRAM PLAN

Name MATTHEWS, Kenneth Register No.: 33195-138 Date: 1-18-78

RAPS PRIORITY:

A. Transfer Recommendation:

None

B. Environmental Factors: 1. Correctional Need:

None

2. Recommended Program:

C. Health: 1. Correctional Need:

None

2. Recommended Program:

D. Skills: 1. Correctional Need:

Upgrade education.

2. Recommended Program:

College courses.

E. Character Traits: 1. Correctional Need:

Gain insight.

Recommended Program:

Group counseling.

Inmate Signature Date

LVN-210

(11)

REFERRAL TO REGIONAL COMMISSIONER

Matthews, Kenneth K. Date 5-3-78

No. 35195-136 Institution Ftn Region NE

REASONS FOR REFERRAL

(INITIAL) (FOUR-YEAR RECONSIDERATION) (HEARING)

PANEL'S RECOMMENDATION OUTSIDE GUIDELINES: BELOW ____ ABOVE ____

RECOMMENDATION BY PANEL TO PAROLE

SPLIT RECOMMENDATION BY PANEL

ORIGINAL JURISDICTION (Nat. security; Unusual interest; sentence 45 years or longer, large scale or sophisticated crime).

CRIME OF VIOLENCE OR POTENTIAL VIOLENCE (Examples: Murder, Kidnapping, Bombing, Forcible Rape, Skyjacking, Armed Robbery or Assault with Injury or Firearm).

SALE OF HEROIN OR COCAINE (Only if offense is "pleaded down.")

LONG TERM SENTENCE (25 through 44 years).

OTHER (Examples: Salient factor or offense severity questioned) (unusual interest in case by Congress, Judge). $150,000

COMMENTS BY ADMINISTRATIVE HEARING EXAMINER: The offense behavior (Name) under for 100,000 lb. marijuana bust, in which was deliberately cooled-off when Matthews learned that the undercover agent was wearing a wire. Matthews is a high-rank member of the Aryan Brotherhood. Recommend 5-6 months to conclude.

DECISION BY REGIONAL COMMISSIONER: Robert Vincent (Name)

I Agree with: (1) ✓ (The Panel) (2) _____ (AHE) (3) _____ (Examiner - by Name)

__ Refer to National Commissioners for reconsideration of decision

__ Refer to National Commissioners for declassification of previous Original Jurisdiction status.

__ Case designated for Original Jurisdiction

__ Not an Original Jurisdiction case; agree with alternate decision of panel

__ Other _____

COMMENTS BY REGIONAL COMMISSIONER: _____

(Use reverse for comments if necessary, use tumble style)

CO-1.11

7

April 1, 1971

Mr. Lynn P. Dunn
IMP, Inc.
330 Manor Oak #1
Pittsburgh, Pa. 15220

Dear Lynn:

As you know, the Board of Directors of IMP, Inc. has purchased a decreasing term insurance contract on your life. As we have agreed, the amount of this contract is $100,000. This letter is to confirm the fact that in consideration for your services, all monies in excess of the current outstanding corporate liabilities at the time the policy should be paid, will be payable to your estate.

In addition, when the initial capital of the corporation ($100,000) has been raised, the entire amount of this policy will be payable to your estate at the discretion of the Board.

Will you please sign below indicating your acceptance of the conditions of the purchase of this insurance.

Very truly yours,

Richard P. Laurie

Richard P. Laurie
IMP, INC.

Accepted by:

_____
Lynn P. Dunn

" No Gain To Matthew"

July 15, 1971

Mr. Lynn P. Dunn
LPDEquity Corp.
330 Manor Oak #1
Pittsburgh, Pa. 15220

Dear Mr. Dunn:

As you know, Spinet Corp. has purchased a decreasing term insurance contract on your life. As we have agreed, the amount of this contract is $30,000. This letter is to confirm the fact that in consideration for your consulting services, all monies in excess of $30,000 shall immediatly be payable to your estate, and/or your wife, in a manner to be arranged.

The residual amount of $30,000 shall be used to pay the corporation for all monies which they may have due from LPD Equity Corp., Lynn P. Dunn and/or IMP, Inc. All monies not used to pay these obligations shall be equally divided and 1/2 shall be payable to your wife.

Very truly yours,

Richard P. Laurie, President
Spinet Corporation

RPL:nm

" No Gain To Matthews

D.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NOS. 78-2370/2410/2584/2585

UNITED STATES OF AMERICA

v.

FRANCIS D. FERRI a/k/ Rick
JOSEPH LAVERICH
KENNETH R. MATTHEWS

Kenneth R. Matthews, Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
Crim. No. 74-0277 (2255 appeal)

Submitted Pro Se February 4, 1980

Before: ADAMS, HUNTER and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgments of the district court in these various matters be and are hereby affirmed.

BY THE COURT,

Circuit Judge

ATTEST:

Thomas F. Quinn, Clerk

DATED: MAR 7 1980

Certified as a true copy and issued in lieu of a formal mandate on April 18, 1980.

Attest:

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

COPY

April 2, 1980

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78-2370

UNITED STATES OF AMERICA

vs.

FRANCIS D. FERRI a/k/a Rick
JOSEPH LAVERICH
KENNETH MATTHEWS
Kenneth Matthews, Appellant
(D.C. Civ. No. 74-227)

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Rosenn, Hunter, Garth, Higginbotham and Sloviter, Circuit Judges

Submitted is appellant's petition for a rehearing or, in the alternative to transfer to the court in banc, which appellant desires to have treated as a petition for rehearing in banc

in the above-captioned case.

Respectfully,

T. F. Quinn (mDB)

TFQ:MDB:ls
enc.

Clerk

The foregoing Motion ~~is~~ is denied.

By the Court,

A. L. Aldisert

Dated: April 10, 1980

Circuit Judge

No. 79-6574

RECEIVED
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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

KENNETH R. MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-6574

KENNETH R. MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the ex post facto clause of the Constitution was violated by the retroactive application of new parole guidelines, which do not authorize his immediate release.

1. Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of various charges relating to an attempted murder by bombing. He was sentenced to a total of 15 years' imprisonment with release on parole at such time as the parole board may determine, pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2).[1/] The court of appeals affirmed (532 F.2d 748), and this Court denied certiorari. 426 U.S. 951 (1976).

1/ 18 U.S.C. (1970 ed.) 4208(a)(2) provided:

> (a) Upon entering a judgment of conviction, * * * (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board may determine.

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. 2255 (Pet. App. 4)[2/] He alleged that the guidelines used by the parole authorities in determining his expected release date had changed between the time he was sentenced on April 23, 1975, and the time he began serving his sentence on December 1, 1977. The result, petitioner claims, is that his release date has been postponed, frustrating the sentencing court's intention (Pet. App. 4). Petitioner also argued that his sentence had been amended by parole authorities from Section 4208(a)(2) parole eligibility to Section 4205(b)(2)[3/] parole eligibility. The district court, in denying petitioner's requested relief, noted that "[t]he Parole Commission and Reorganization Act, effective May 14, 1976, recodified §4208(a)(2) intact at 18 U.S.C.A. §4205(b)(2) (West Supp. 1977)." The court expressly found that its sentencing intention had not been thwarted by the new parole policies (Pet. App. 2). The court of appeals affirmed.

2/ Petitioner has filed several actions seeking collateral relief from his conviction (Matthews v. United States, No. 79-6390 (cert. denied June 2, 1980), and Matthews v. United States, No. 79-6579). He argues in those petitions that the government failed to produce exculpatory evidence and statements of witnesses; that the government failed to disclose all promises and rewards given to one of the government witnesses; that he was denied a speedy trial; and that the proof at trial failed to show any interstate commerce nexus for purposes of his federal explosives conviction under 18 U.S.C. 944.

3/ 18 U.S.C. 4205(b)(2) provides:

> (b) Upon entering a judgment of conviction, * * * (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

2. Petitioner contends that the application of the parole guidelines, which became effective after his sentencing, violates the ex post facto clause of the Constitution. He claims that the use of the new guidelines will result in a longer period of incarceration before he is released on parole. This claim was properly rejected by the courts below.

Petitioner was sentenced to 15 years' imprisonment with parole release at the parole board's discretion pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2) (now 18 U.S.C. 4205(b)(2)). Sentencing under this section was construed as making prisoners eligible for early parole United States v. Wickham, No. 79-1101 (9th Cir., Dec. 18, 1979), slip op. at 1274. It did not, however, compel their early release.[4/] As this Court noted in United States v. Addonizio, 442 U.S. 178, 189 (1979) (footnote omitted):

> The authority of sentencing judges to select precise release dates is * * * narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.

Since petitioner did in fact receive an early parole hearing on April 18, 1978 (Pet. 4), the Parole Commission fully recognized petitioner's early parole-eligibility status and acted in accordance with the law. The Commission's decision not to release petitioner at that time and its prediction of 55 months' incarceration before release were well within its discretion and did not conflict with the sentencing court's intention, as the district court held (Pet. App. 5). Moreover,

---

4/ Section 4208(a)(2) was used by many courts, when long sentences were imposed, in order to make parole available in the event of totally unforeseen circumstances. Battle v. Norton, 365 F.Supp. 925, 932 (D. Conn. 1973). In fact, the great majority of prisoners sentenced under Section 4208(a)(2) were either released at a date beyond the one-third point in their sentence or at the expiration of their sentence. See Garafola v. Benson, 505 F.2d 1212, 1215 & n.3 (7th Cir. 1974).

the actual release dates of prisoners sentenced under Section 4208(a)(2) prior to the adoption of the new parole guidelines, clearly show that the application of the new guidelines in petitioner's case did not increase petitioner's punishment.[5/] Accordingly, in this situation where there has been no decrease in petitioner's parole eligibility, the application of the new parole guidelines does not offend the ex post facto clause of the Constitution. See United States v. Wickham, supra; cf. Geraghty v. United States Parole Commission, 579 F.2d 238, 266 (3d Cir. 1978), vacated on other grounds, No. 78-572 (March 19, 1980).

No conflict in the circuits remains concerning whether the new parole guidelines offend the ex post facto clause. On March 19, 1980, this Court decided United States Parole Commission v. Geraghty, No. 78-572, but did not reach the merits of the ex post facto claim, stating (slip op. at 19) that "[i]t would be inappropriate * * * to reach the merits of this controversy in the present posture of the case," and adding (id. at 20) that "although the court of appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of [Geraghty's] case until after it is determined affirmatively that a class properly can be certified." Accordingly, the Court vacated the judgment and remanded to the court of appeals for further proceedings.

Inasmuch as the court of appeals' judgment in Geraghty has been vacated, there no longer exists a conflict among the circuits concerning whether application of the parole release guidelines to prisioners sentenced prior to the guidelines'

effective date violates the ex post facto clause. The courts of appeals uniformly agree that such application of the guidelines does not constitute an unconstitutional ex post facto enhancement of a criminal sentence. See Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979); Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977); Ruip v. United States, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). For the reasons stated in our brief in Geraghty,[6/] we believe that this conclusion is correct. Therefore, we submit that in the absence of a conflict it is not necessary for this Court to consider the ex post facto claim asserted here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JULY 1980

6/ We are sending petitioner a copy of our brief in Geraghty.

RECEIVED
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SUPREME COURT, U.S.

NO: 79-6574

ORIGINAL COPY

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

KENNETH R. MATTHEWS

VS.

THE UNITED STATES OF AMERICA

PRO SE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRO SE TRAVERSE TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

Pet. Reply Brief

KENNETH R. MATTHEWS
PEMBROKE STATION
DANBURY, CT. 06810

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO: 79-6574

KENNETH R. MATTHEWS

VS.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TRAVERSE IN RESPONSE TO THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION

NOW COMES THE PETITIONER, KENNETH R. MATTHEWS WHO BEING DULY SWORN DEOSES AND SAYS:

1. IMMEDIATELY UPON RECIEPT OF THE MEMORANDUM OF THE UNITED STATES IN OPPOSITION I WAS REMOVED TO THE WESTERN DISTRICT OF PENNSYLVANIA ON A WRIT OF THE HONORABLE DISTRICT COURT, AND SEPARATED FROM ALL LEGAL DOCUMENTS IN THE MATTER BEFORE THIS HONORABLE COURT; I WOULD PRAY TO IMMEDIATELY RESPOND TO THE MEMORANDUM IN OPPOSITION UPON MY RETURN TO THE DANBURY F.C.I., MY DESIGNATED PLACE OF INCARCERATION AND MY DOCUMENTS.

2. THE HONORABLE WADE H. McCREE, JR., SOLICITOR GENERAL IS CORRECT IN STATING "ON APRIL 18, 1978. THE COMMISSION FULLY RECOGNIZED PETITIONERS EARLY PAROLE ELLIGIBILITY STATUS IN ACCORDANCE WITH THE LAW. THE COMMISSIONS DECISION AT THAT TIME AND IT'S PREDICATION OF 55 MONTHS INCARCERATION"(GREATEST II SEVERITY); HOWEVER WHEN THIS PETITIONER SOUGHT THE PROPER APPLICATION OF GREATEST I SEVERITY CALLING FOR 40 MONTHS, THE COMMISSION ADMITTED IT'S ERROR APPLYING THE PROPER GUIDELINE RANGE OF 40-52 MONTHS INCARCERATION AND AGGREVATED THEIR (JIC) GUIDELINES TO A DECISION OF 78 MONTHS INCARCERATION IN VIOLATION OF THEIR RULES AND REGULATIONS AS FOUND AT 28 C.F.R. 2.1-2.60.

3. THIS ACTION IS AND WAS IN VIOLATION OF 28 C.F.R. 2.2.28, REOPENING OF CASES AND SHOWS A MALICIOUS AND CAPRICIOUS SET OF ACTION ON THE PART OF THE COMMISSION AS NO NEW ADVERSE INFORMATION HAD BEEN RECIEVED BUT ONLY FAVORABLE INFORMATION.

4. THE COMMISSION FURTHER VIOLATED 28 C.F.R. 2.19 INFORMATION COSIDERED IN A "STAR PROCEEDINGS" TRIAL WITHOUT COUNSEL ON INFORMATION THAT EXISTS ONLY IN IT'S "ERRONEOUS" RECORDS, AND HAVING NO FACTUAL BASIS IN THE EVIDENCE OF TRIAL, TESTIMONEY OR TRUTH OF TRIAL.

5. THE COMMISSION VIOLATES IT'S OWN PREPONDERENCE OF EVIDENCE RULEIN TRYING THE PETITIONER FOR A SOUGHT MURDER, UNCHARGED BY THE STATE, THE COMMONWEALTH OF PENNSYLVANIA; WHO WITH THE EVIDENCE OF TRIAL FOND NO STATE STATUTES VIOLATED BY THE PETITIONER AND CONTINUES FURTHER IN VIOLATING IT'S RULES BY AGGREVATING THE OFFENSE OF THE PETITIONERS CONVICTION BY IT'SVERY SELF.

THE PETITIONER WOULD THEREFORE PRAY THAT THIS COURT IN THE INTERESTS OF JUSTICE
TO THIS HONORABLE COURT. IN THE UNITED STATES AND THAT THIS HONORABLE
SUPREME COURT SHOULD GRANT HIS PETITION FOR A WRIT OF CERTIORARI, OR SUCH
OTHER RELIEF IT DEEM APPROPRIATE IN THE CIRCUMSTANCES.

RESPECTFULLY SUBMITTED,

KENNETH R. MATTHEWS
PEMBROKE STATION
DANBURY, CT. 06810

EXECUTED THIS 4th DAY OF OCTOBER 1980 I SWEAR THE FOREGOING IS TRUE AND CORRECT UNDER THE PAIN AND PENALTY OF PRJURY PURSUANT TO TITLE 28 U.S.C. 1746 AND A TRUE AND CORRECT COPY MAILED TO:

THE SOLICITOR GENERAL OF THE UNITED STATES
C/O THE UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

THE OFFICE OF THE UNITED STATES ATTORNEY
PITTSBURGH, PA. 15219

THE THIRD CIRCUIT COURT OF APPEALS
PHILADELPHIA, PA. 19106

Parole Form H-29
(Rev. Dec. 1977)

FED. CORR. INST.
DANBURY, CT.
JAN 80

UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537

Notice 1-8-80

NOTICE OF ACTION ON APPEAL

Name KENNETH R. MATTHEWS

Register Number 33195-138 *Institution* Danbury

REGIONAL APPEAL: The appeal by the above-named has been carefully examined by the Regional Commissioner and the following was ordered:

_____ Affirmation of the previous decision.

XX Reversal or modification of the previous decision, as follows: Reopen and schedule for a new initial hearing on next docket.

_____ An institutional hearing during the month of _____

_____ A regional appellate hearing before the Regional Commissioner.

You have a right to appeal this order to the National Appeals Board. Forms for that purpose may be obtained from your caseworker, and must be filed with the Parole Commission, through the appropriate Regional Office within 30 days of the date shown below. All appeals (Regional and National) must be sent to the Regional Office for processing.

NATIONAL APPEAL (Full Commission): The appeal by the above-named has been carefully examined by the National Appeals Board (Full Commission) and the following was ordered:

_____ Affirmation of the previous decision.

_____ Reversal or modification of the previous decision as follows: _____

_____

_____ An institutional hearing during the month of _____

_____ A rehearing at the regional appellate level.

All decisions by the National Appeals Board (Full Commission) on appeals are final.

December 28, 1979
(Date Notice sent)

NORTHEAST
(Region-specify)

ljb
(Docket Clerk)

National Appeals Board _____ (Check)

INMATE COPY

Full Commission _____ (Check)

Form 1-24
Rev. June 1979

UNITED STATES DEPARTMENT OF JUSTICE

United States Parole Commission
Washington, D.C. 20537

Date 1-8-80

NOTICE OF HEARING – PAROLE APPLICATION, REPRESENTATIVE AND DISCLOSURE REQUEST

Name: MAtthews, Kenneth

Register No. 33195-138 Institution FCI Danbury, Ct

1. NOTICE OF HEARING: Provided you have applied for parole in the space below, you will be given a he ing by officials of the U.S. Parole Commission on the docket of parole hearings scheduled _____ to Feb, 1980 [Juveniles do n apply for parole and will be heard as scheduled.]

NOTE: In certain cases the decision will be made by a quorum of National Commissioners under origi jurisdiction procedures. See 28 C F R 2.17.

IF THERE ARE LESS THAN 60 DAYS BETWEEN THE DATE OF THIS NOTICE AND YOUR HEARIN YOU MUST INITIAL WAIVER NO. 1 ON THE REVERSE SIDE OF THIS FORM TO RECEIVE YOUR HEA ING AS SCHEDULED.

2. APPLICATION: I hereby apply for parole, or have previously applied and still wish to be paroled:

X Kenneth Matthews (Signature) 1/8/80 (Date)

IF YOU WISH TO POSTPONE YOUR PAROLE HEARING UNTIL A LATER TIME, INITIAL WAIVER NO. ON THE REVERSE SIDE OF THIS FORM.

3. REPRESENTATIVE: At your hearing you may have a representative of your choice who will be permitted make a statement on your behalf at the close of the hearing. The name of any representative willi and able to appear should be written in below. Arrangements for the appearance of a representati must be made through your case manager.

Name of Representative: R. Mahon Staff Corr Counselor

IF YOU DO NOT WISH A REPRESENTATIVE, INITIAL WAIVER NO. 3 ON THE REVERSE SIDE OF TH FORM.

4. DISCLOSURE OF FILE INFORMATION: You may review the reports and documents in your file whi will be considered by the Commission, if you submit a request for disclosure on this form at lea 15 days in advance of your hearing. [NOTE: Certain material which the Commission will consid may be exempt by law from disclosure. In such event, a summary of the material withheld from yo will be furnished if you request to review your file.]

*KM (initials) I wish to inspect the disclosable material in my institutional file.

_____ (initials) I wish to inspect any documents concerning me which the Parole Commission may have in its gional Office. I understand that in most cases, the Commission will have no material, until after initial hearing has been held. [If you request disclosure of Regional Office documents you must so on this form at least 30 days in advance of the hearing.]

NOTE: At review hearings, the Commission will consider only information about factors which have char or which may have changed, since your last parole hearing.

IF YOU DO NOT WISH TO REQUEST ANY DISCLOSURE, INITIAL WAIVER NO. 4 ON THE REVERSE OF THIS FORM.

INMATE COPY

WAIVERS refused to Sign

1. PRE-HEARING NOTICE

X KRH (initials) I received this form less than 60 days from the date of my hearing. However, I hereby waive my right to 60 days advance notice of the hearing time and notice of my disclosure rights, and I request to be heard as scheduled.

UNLESS OTHERWISE ADVISED BY COUNSEL

2. PAROLE CONSIDERATION

_____ (initials) I do not wish to be considered for parole at this time, and for that reason, I waive the hearing which has been scheduled for me. I understand that I may still apply for parole at a later date, and will be scheduled for a hearing provided I submit an application at least 45 days prior to the first day of the month in which hearings are conducted at the institution where I am then confined.

3. REPRESENTATIVE

_____ (initials) I do not wish a representative at my hearing.

4. DISCLOSURE OF FILE MATERIAL

_____ (initials) I do not wish to inspect my files before the hearing scheduled on the front of this form.

USE THIS SECTION ON THE DAY OF THE HEARING ONLY

I have been told that certain reports in my file, which I had requested to see, have not been cleared for disclosure in time for this hearing. I hereby waive their disclosure, permitting the Parole Commission to consider them, and request that my hearing proceed as scheduled, rather than having it postponed. I understand, however, that all disclosable material and summaries of any exempt material will be shown to me as soon as clearance by the agency which prepared it is received.

_____ (signature) _____ (date)

INSTRUCTIONS: This form is to be furnished to and completed by every inmate prior to every scheduled hearing before the Parole Commission. It must be furnished at least 60 days in advance of the scheduled hearings unless such 60 day notice is waived by the inmate (see "1" above). If the inmate inspects file material have him initial below.

KRH (initials) I have reviewed the materials in my institutional file on 01-08-, 1980

_____ (initials) I have reviewed the Parole Commission file material on _____, 19___.

Parole Form H-7
(Rev. April 1978)

Ex 13, 14

UNITED STATES DEPARTMENT OF JUSTICE
United States Parole Commission
Washington, D. C. 20537

R. EAST.
BURY, CT.

10 02 AM '80

RS

NOTICE OF ACTION

Name MATTHEWS, Kenneth R. | 3

Register Number 33195-138 *Institution* Danbury. | 2

In the case of the above-named the following parole action was ordered:

CONTINUE FOR PRESUMPTIVE PAROLE AFTER SERVICE OF 72 MONTHS (NOVEMBER 30, 1983).

A presumptive parole date is conditioned upon your maintaining good institutional conduct and the development of a suitable release plan. Prior to release your case will be subject to review to ascertain that these conditions have been fulfilled. In NARA cases a parole date is also contingent upon certification of release readiness by the Surgeon General. | 2

(Reasons for continuance or revocation) (Conditions or remarks)

Your offense behavior has been rated as Greatest I severity because it involved an explosive detonation in an area where there was a high potential for serious injury to persons not at all related to events surrounding the intended crime of murder. You have a salient factor score of 10. You have been in custody a total of 27 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 40-52 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision above the guidelines appears warranted because in committing this crime, you not only sought to have your business partner murdered, but also share responsibility for causing a codefendant to experience the loss of a hand and a section of an upper arm. As required by law, you have also been scheduled for a statutory interim hearing during February, 1982. | 0 X | 1 | 1

Appeals procedure: You have a right to appeal a decision as shown below. You may obtain forms from your caseworker and they must be filed with the Commission within thirty days of the date this Notice was sent. | 1

A. Decision of a Hearing Examiner Panel. Appeal to the Regional Commissioner.

B. Decision of a Regional Commissioner relative to Parole condition or continuance under supervision. Appeal to the Regional Commissioner.

C. Other decisions of the Regional Commissioner. Appeal to the National Appeals Board.

D. Decision of National Commissioners in original jurisdiction cases. Appeal to the entire Commission. | 10

E. Other decision of the National Commissioners. Appeal to the Regional Commissioner.

Copies of this notice are sent to your institution and/or your probation officer. In certain cases copies are sent to the sentencing court. You are responsible for advising any others, if you so wish.

1980 NORTHEAST ew

(Date) (Region) (NAB) (Nat. Dir.) (Docket Clerk)

FPI—NAB—4-17-79-200-1943

OFFICE OF THE CLERK OF COURTS

County of Allegheny

114 COURT HOUSE PITTSBURGH, PA. 15219
PHONE 355-5322

JOHN C. KYLE
CLERK OF COURTS

May 21, 1980

Kenneth R. Matthews
Federal Correctional Institution
Danbury, Conn. 06813

Dear Mr. Matthews:

A search of the Clerk of Courts records show no criminal complaint has been found for Kenneth R. Matthews, as of this date.

Very truly yours,

Wayne P. Kelly

WAYNE P. KELLY
DEPUTY CLERK OF COURTS

WPK/ml

John C. Kyle
Clerk of Courts

I-4 (Rev. 5-9-73)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

3-25-80 214 NAJ

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This FBI record is furnished to Mr. Kenneth Robert Matthews pursuant to Department Order 556-73.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
USM Pgh PA	Kenneth R Matthews 623-7303	5-23-73	Conspiring to damage by means of explosive-Title 18 : Sections 844 (i)	
ATF Phila PA	Kenneth Robert Matthews 6078	5-24-73	Damage veh used in activity affecting interstate commerce w/an explosive	See Supplement
USM Pgh PA	Kenneth Robert Matthews 623-8876	9-4-74	Damaging Property by explosives Ading & Abetting. Non registered firearms and making fire-arms.	4-23-75 Ct 1: 5 yrs Ct 2 15 yrs to run conc Cts 3,4,5& 5 yrs conc to Ct. 1&2 Cts 7 & 8 3 yrs conc with ea other Deft elig for mar under 18 USC. 4208(a)(2) No.F or C
US Pen Leavenworth KS	Kenneth Robert Mathews 33195-158 F070 535	12-22-77	Attempt to damage prop by explo/unreg F/A	15 yrs

MASTER
I-4 (Rev. 5-9-72)

MASTER

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D.C. 20537

3-25-8[illegible] 264 [illegible]

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CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
		5-24-73 6078	Found guilty on Counts 1-5 by jury trial. 5 yrs imprisonment on charge of Count 1- Title 18, USC, Sec. 844 (I),371. 15 yrs imprisonment, to run concurrent with Count 1. on charge of Count 2 - Title 18 USC Sec. 844 (I) and Sec. 2, 3 yrs imprisonment to run concurrent with each other and to run concurrent with Counts 1&2. No fine, no costs on charge of Counts 3 Title 26 USC, Sec 5861 (d) 5871, Title 18, USC Sec 2, Count 4 Title 26, 5861 (c) and 5871, Title 18, USC, Sec. 2. Count 5 - Title 26, Sec 5861 (f) and 5871, Title 18, USC, Sec. 2.	

MASTER

I-4 (Rev. 7-10-77)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
WASHINGTON, D. C. 20537

3-25-80 264 NAI

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954 637 K10

Use of the following FBI record, NUMBER , is REGULATED BY LAW. It is furnished FOR OFFICIAL USE ONLY and should ONLY BE USED FOR PURPOSE REQUESTED. When further explanation of arrest charge or disposition is needed, communicate directly with the agency that contributed the fingerprints.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Fed Corr Inst Danbury CT	Kenneth R. Matthews 33195-138A F070535	12-6-78	Consp Att to damage Prop by Explosives & Rec. Frm 18-371 -844,1341 & 26-5861	15 yrs